Supreme Court, U.S.
FILED
OCT 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-373

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STEVEN P. FLANAGAN, WILLIAM L. FLANAGAN and MITCHELL L. DRUCKER,

Petitioners,

vs.

PRUDENTIAL-BACHE SECURITIES INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Should review be granted where the state court's determination is consistent with the prior decisions of this Court and the federal courts of appeal?

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RESTATEMENT OF THE CASE

Petitioners' statement of the case requires correction for it fails to acknowledge the following relevant facts.

In 1983, as a condition of consideration of their applications for registration as New York Stock Exchange ("NYSE") registered representatives, each petitioner agreed in writing to be bound by the NYSE rules and constitution. (4a-5a)[1]

NYSE Rule 347 expressly mandates arbitration for "[a]ny controversy. . . arising out of the employment or the termination of employment." (6a)

NYSE Constitution, Article VIII, Section 1, by which petitioners also agreed to be bound, provides that "any controversy between a non-member and a

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1. Citations to Petitioners' Appendix are designated "___ a."

member. . . arising out of the business of such member. . . shall. . . be submitted for arbitration, in accordance with the provisions of the constitution and the rules of the Board of Directors." (5a-6a)

Moreover, each petitioner executed an employment agreement with respondent in which petitioners agreed to arbitrate "any claim or controversy arising out of or respecting any matter contained in [the] Agreement." (4a)

On August 6, 1984, without prior notice, petitioners terminated their employment with respondent and immediately began employment with Rooney Pace, Inc., another NYSE member. (2a)

In their complaint, petitioners allege that respondent defamed them the same day "immediately after [petitioners] notified [respondent] of the termination of their

employment" by writing to respondent's customers theretofore serviced by petitioners. The text of that letter appears at Pet. 6-7.

NYSE Rule 345.18 obligated petitioners' new employer to "make a thorough inquiry" with respondent, as petitioners' prior employer, as to petitioners' "reputation." NYSE Rule 345.18 provides, in relevant part:

> "Investigation and Records.--Members and member organizations should make a thorough inquiry into the previous record and reputation of persons whom they contemplate employing. The background and reputation checks should, whenever possible, include at least personal conversations with all employers during the previous 3 years."

On August 8, 1984, two days after petitioners' termination, petitioners' new employer requested information as to petitioners' conduct during their employment with respondent. According to the complaint, respondent defamed petitioners

by giving false information as to their "professional conduct while employed at [respondent]." (emphasis added) The complaint reads in relevant part as follows:

> "11. On or about August 8, 1984, defendant, by and through its Vice President Felix McCarthy, again defamed plaintiffs in their business reputation by making the false, defamatory, malicious and slanderous statement to Edmond O'Donnell, plaintiffs manager at Rooney Pace, Inc., that there were three lawsuits pending against plaintiffs with respect to their professional conduct while employed at Shearson American Express and two additional lawsuits pending against plaintiffs with respect to their professional conduct while employed at defendant." (¶ 11; emphasis added)

Based on each of the arbitration agreements, the New York Court of Appeals determined that the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1983), required petitioners to arbitrate these defamation claims, "notwithstanding that the alleged defamatory statements were made after

termination of the account executive's employment." (1a)

The Court of Appeals held that NYSE Rule 347 is not limited to contractual disputes but includes (i) claims "which involve significant aspects of the employment relationship" (16a, quoting Morgan v. Smith Barney, Harris Upham & Co., 729 F.2d 1163, 1167 (8th Cir. 1984)) and (ii) disputes based on post-employment events which relate to employment (14a, citing Nolde Bros. v. Bakery & Confectionery Workers, 430 U.S. 243, 252 (1977)).

In addition to citing NYSE Rule 347, the Court of Appeals found that arbitration was required (i) by the NYSE Constitution, because the dispute arises "out of the business of a NYSE member" (17a-19a), and (ii) pursuant to the employment agreement signed by each peti-

tioner, because this dispute is a "claim or controversy arising out of or respecting" matters in the employment agreement, which included petitioners' performance as employees and termination of their employment. (19a-20a)

ARGUMENT

REVIEW SHOULD NOT BE GRANTED BECAUSE THE STATE COURT'S DETERMINATION IS CONSISTENT WITH THE PRIOR DECISIONS OF THIS COURT AND THE FEDERAL COURTS OF APPEAL

There are no "special and important reasons" for granting review of the state court's decision. See Supreme Court Rule 17.1; Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955). The New York State Court of Appeals based its decision on two independent grounds not before the Second Circuit in Coudert v. Paine Webber Jackson & Curtis, 705 F.2d 78 (2d Cir. 1983) ("Coudert"), on which

petitioners mainly rely.[2] Moreover, the state court's decision is wholly consistent with the prior decisions of this Court and the federal courts of appeal, which have uniformly declared the national policy of favoring arbitration of these disputes.

A. The NYSE Constitution and Petitioners' Employment Agreements Were Not Before the Second Circuit in Coudert and the State Court's Reliance on These Factors Therefore Was Not in Conflict With the Coudert Decision

Petitioners' main basis for petitioning for a writ of certiorari is a purported conflict between the New York State Court of Appeals' decision and that of the Second Circuit in Coudert.

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2. Coudert was decided by a divided panel of the Second Circuit. The dissenting judge in that case was Judge Weis, a Judge of the Third Circuit Court of Appeal sitting by designation. (705 F.2d at 79)

(Supreme Court Rule 17.1(b)) In Coudert, the Second Circuit held that a dispute as to defamatory statements made after termination of employment was not required to be arbitrated pursuant to NYSE Rule 347. Petitioners claim that as a result of the purported conflict, great uncertainty will exist in the securities industry and forum-shopping could occur between New York State and New York federal courts when diversity jurisdiction is present. (Pet. at 25-28)

The only issue before the Second Circuit in Coudert, however, was NYSE Rule 347. "[T]he sole issue raised by defendant's motion. . . is whether the parties are compelled to arbitrate their disputes under the rules of the New York Stock Exchange." Coudert v. Paine Webber Jackson & Curtis, 543 F. Supp. 122 (D. Conn. 1982) rev'd, 705 F.2d 78 (2d Cir.

1983). The New York State Court of Appeals, however, found that this case "involves a great deal more than Rule 347" (17a) and stated two additional independent bases for its decision in favor of compelling arbitration: (1) the NYSE Constitution, Art. VIII, Section 1 (17a-19a); and (2) the language of petitioners' employment agreements with respondent (19a-20a).

NYSE Constitution, Art. VIII, Section 1, requires arbitration of any controversy "arising out of the business of" an NYSE member (17a). This language differs from that of Rule 347, which refers only to controversies arising out of "employment or termination of employment." The New York State Court of Appeals found that the first alleged defamation -- the customer letter -- "may be fairly said to have arisen from [respondent's] business

for the obvious purpose of the letter was to retain the business of the customers plaintiff had serviced while employed by defendant." (18a) The Court found that the second alleged defamation also "arose out of [respondent's] business and, therefore, under the Exchange Constitution must be arbitrated" because it was in response to an inquiry required by NYSE Rules. (18a)

The Court of Appeals found that the individual employment agreement "provides yet another reason why arbitration rather than judicial resolution of their claim is required." (19a) Those agreements refer to matters "arising out of or respecting" employment, performance or termination. The Court of Appeals found that "respecting" has a "broader connotation than 'arising out of.'" (20a) Consequently, the Court of Appeals found

the controversy to be within the scope of the arbitration provision of the employment agreements. It is not appropriate for this Court to grant certiorari to review individual employment agreements containing facts unique to this litigation. Rice v. Sioux City Memorial Park Cemetery, Inc., supra, 349 U.S. at 74.

The New York Court of Appeals thus provided grounds for arbitration other than the language of the NYSE Rule 347. The Second Circuit in Coudert did not have these additional grounds before it. There is no conflict between the New York State Court of Appeals and the Second Circuit.

Because of these independent bases for the state court's decision, there is no threat of forum shopping. Indeed, the state court decision is fully consistent with Second Circuit decisions subsequent

to Coudert which addressed NYSE Constitution, Article VIII, Section 1, or specific language in employment agreements which -- as here -- required certain actions after termination. See Paine, Webber, Jackson & Curtis v. Chase Manhattan Bank, N.A., 728 F.2d 577, 581 n.6 (2d Cir. 1984) (limiting Coudert to the "narrow construction" of the terms "employment" and "termination"); Downing v. Merrill Lynch, Pierce, Fenner & Smith Inc., 725 F.2d 192, 194-95 (2d Cir. 1984) (distinguishing Coudert and compelling arbitration after addressing Article VIII, Section 1 and the language of the employment agreement which involved post-termination conduct). A recent district court decision has followed this limitation of Coudert and ordered arbitration of a dispute similar to petitioners' claims here. McMahon v. RMS

Electronics, Inc., 618 F. Supp. 189, 192 (S.D.N.Y. 1985) (distinguishing Coudert because defamatory statements after termination were contained in "required reports" under the employment agreement). These Second Circuit decisions are consistent with the New York State Court of Appeals' decision; there can be no legitimate anticipation of forum shopping.

B. The State Court Decision is Consistent With Post-Coudert Decisions By This Court and the Federal Courts of Appeal

In staying the action in favor of arbitration (20a), the New York Court of Appeals applied the holdings of this Court's unbroken line of cases which have mandated that questions of arbitrability are to "be addressed with a healthy regard for the federal policy favoring arbitration" and "any doubts concerning

the scope of arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) ("Cone"); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, ___ U.S. ___, 105 S.Ct. 3346, 3354 (1985) (antitrust); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 105 S.Ct. 1238 (1985) (securities industry). While Cone, supra, was decided before Coudert, the argument in Coudert preceded this Court's decision in Cone. Each of the latter two decisions was made after the Second Circuit's decision in Coudert.

In applying the policy favoring arbitration, this Court consistently has found that "contract termination does not control the arbitrability of th[e] claim." Nolde Bros., Inc. v. Local No.

358, Bakery & Confectionery Workers Union, supra, 430 U.S. at 252 (1977).

Subsequent to Coudert, every federal Court of Appeals which has decided issues involving the arbitrability of alleged post-termination defamations of employees of securities brokerage firms by the employer has required arbitration. Zolezzi v. Dean Witter Reynolds, Inc., 789 F.2d 1447 (9th Cir. 1986); Aspero v. Shearson American Express, Inc., 768 F.2d 106 (6th Cir.), cert. denied, ___ U.S. __ , 106 S.Ct. 582 (1985); Morgan v. Smith Barney, Harris Upham & Co., 729 F.2d 1163 (8th Cir. 1984). Each of those decisions is consistent with the decision below.

Given that the Second Circuit has narrowed the Coudert holding to its limited facts, see Chase Manhattan, supra, 728 F.2d at 581 n.6, Downing, supra, 725 F.2d at 194-195, there is no real con-

flict among the circuits and there is no important reason for this Court to review the New York State Court of Appeals' decision.

CONCLUSION

For the foregoing reasons, the Court should not grant the petition for a writ of certiorari to the Court of Appeals of the State of New York.

Dated: New York, New York
October 2, 1986

Respectfully submitted,

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LISTING OF PARENTS, SUBSIDIARIES
AND AFFILIATES AS REQUIRED BY
SUPREME COURT RULE 28.1

A. PRUDENTIAL CAPITAL AND INVESTMENT SERVICES, INC.

Prudential Securities Group Inc.

The Prudential Bank and Trust Company

PruCapital, Inc.

Prudential Global Funding, Inc.

London Global Funding Limited

PGF Canada, Ltd.

B. PRUDENTIAL SECURITIES GROUP INC. (formerly BACHE GROUP INC.)

Bache Cortis & Carr Limited

Bache Halsey Stuart Shields Holding Corporation

Bache Insurance Agency of Arkansas, Inc.

Bache Insurance Agency of Louisiana, Inc.

Bache Insurance Agency of Nevada, Inc.

Bache London Limited

Bache Precious Metals, Inc.

Bache Securities Inc.

Clive Discount Holdings PLC

Clive Discount Company Limited

Clive Discount Holdings International Limited

Clivco Ltd.

Clivwell Securities Limited

Clive Investments Cambridge Limited

Clive Investments Limited

Page & Gwyther Limited

Page & Gwyther Investment Limited

Page & Gwyther Holdings Limited

Halsey Stuart Corporate Services Limited

P-B Finance Ltd.

P-B Securities, Down, de Boer & Duckett, Ltd.

Circle (Nominees) Limited

P-BC Gilts Limited

P-B Securities Limited

P-B Securities Money Brokers Limited

P-B Securities (Unit Trust Sales) Limited

P-B Services (U.K.)

Prudential-Bache Agriculture Inc.

Prudential-Bache Energy Corp.

Prudential-Bache Energy Production Inc.

Prudential-Bache Investor Services Inc.

Prudential-Bache Investor Services II, Inc.

Prudential-Bache Latin America Inc.

Prudential-Bache Leasing Inc.

Prudential-Bache Metal Co. Inc.

Prudential-Bache Minerals Inc.

Prudential-Bache Program Services Inc.

Prudential-Bache Properties, Inc.

Prudential-Bache Real Estate, Inc.

Prudential-Bache Securities Inc.

Prudential-Bache Southern Europe Inc.

Prudential-Bache Trade Corporation

Bache Pacific Trade Limited

Bache Trade Finance Asia Ltd.

K.K. PB Trade Corporation

PB International Bank S.A.

PBTC International Bank

PBTC London Holdings, Inc.

PB Trade Finance Ltd.

PB Trade Ltd.

PB Trade Finance Co., S.A. (PB Trafco)

PB Trade Portugal Lda.

Prudential-Bache Venture Capital Inc.

R & D Funding Corp.

Seaport Futures Management Inc.

Special Situations Management Inc.

C. PRUDENTIAL-BACHE SECURITIES INC.

Bache & Co. (Lebanon) S.A.L.

Bache & Co. S.A. de C.V. (Mexico)

Bache Halsey Stuart Commodities S.A.

Bache Halsey Stuart Shields (Antilles) N.V.

Bache Insurance Agency, Incorporated

Bache Insurance of Arizona Inc.

Bache Insurance of Kentucky Inc.

Bache Securities Asia Pacific Ltd.

Bache Securities Espana, S.A.

Bache Inversiones, S.A.

Bache Securities (Belgium) Inc.

Bache Securities (France) S.A.

Bache Securities (Germany) Inc.

Bache Securities (Greece) S.A.

Bache Securities (Holland) Inc.

Bache Securities (Hong Kong) Limited

Bache Halsey Stuart Shields (U.K.) Ltd.

Bache Securities (Italy) Inc.

Bache Securities (Japan) Ltd.

Bache Securities (Luxembourg) Inc.

Bache Securities (Monaco) Inc.

Bache Securities (South America) S.A.

Bache Securities (Argentina) S.A.

Bache Securities (Switzerland) Inc.

Bache Securities (U.K.) Inc.

Bache Shields Securities Corporation

Banom Corporation

Coba, Inc.

Bache & Company Italy, Inc.

Shields & Company S.A. Geneva

Gelfand, Quinn & Associates, Inc.

Morosto Nominees Inc.

Prudential-Bache Mortgage Services Inc.

Prudential-Bache Puerto Rico Inc.

Shields Model Roland Company (London)

Shields Model Roland (Nominees) Incorporated

Shields Model Roland Securities Incorporated